No. 89-694

Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA,
Petitioner,

—v.—

MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, MCGRAW-EDISON COMPANY, CENTRAL MOLONEY INC, WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Is there any basis for this Court to grant *certiorari* here, where the Court of Appeals' decision is not in conflict with any other federal or state court decision and where the primary issue is whether the Sixth Circuit "erred" in deciding to apply the accrual date of a state statute of limitations rather than that of a federal statute, even though the concept of accrual is identical under both statutes and would yield the same outcome?

2. Should this Court grant *certiorari* when the question as to which the petitioner seeks review, namely, the correctness of the Sixth Circuit's application of a state statute of limitations, would require this Court to review concurrent findings of fact by the two courts below concerning the dates on which petitioner's claims accrued?

Parties to Proceedings Below

Plaintiffs--Appellants:

Electric Power Board of Chattanooga
Huntsville Electric Utilities Board

Defendants—Appellees:

Monsanto Company
General Electric Company
McGraw-Edison Company
Central Moloney Inc
Wagner Electric Corporation
Westinghouse Electric Corporation
Sangamo Electric Corporation[1]

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1 Pursuant to Rule 19.6 of the Rules of the Supreme Court of the United States, the Electric Power Board of Chattanooga, in a notice dated November 15, 1989, notified all parties that neither the Huntsville Electric Utilities Board nor Sangamo Electric Corporation has any interest in the outcome of this petition.

Rule 28.1 Listing

Monsanto Company is an affiliate of Invitron Corporation and Southwall Technologies, Inc., both publicly owned corporations.

General Electric Company has no parent company. The subsidiaries of General Electric Company which have any outstanding equity or debt securities that are publicly held are:

RCA Corporation
General Electric Credit Corporation
General Electric Credit International, N.V.
Canadian General Electric Company, Ltd.
General Electric Overseas Capital Corporation

McGraw-Edison Company's parent company is Cooper Industries, Inc.

Central Moloney Inc's parent company, by merger, is Colt Industries Inc.

Wagner Electric Company's parent company is Cooper Industries, Inc. In 1979, McGraw-Edison Company acquired Studebaker-Worthington, Inc. which included Wagner Electric Company. McGraw-Edison Company was acquired by Cooper Industries, Inc. in 1985.

Westinghouse Electric Corporation has no parent company. The subsidiaries and affiliates of Westinghouse Electric Corporation are:

ADEPT Technologies
AEG-Beteiligunsgesellschaft MBH
AEG-Westinghouse Transportation Systems, Inc.
Airship Industries, Ltd.
Computer Aided Training Company, Inc.
Electromar Industria Electrica Brasileira, S.A.
Electromar Nordeste, S.A.
Email Westinghouse Pty., Ltd.
Enwesa Servicios, S.A.
Eregli Demir ve Celik Fabrikalori, A.S.

Escorts, Ltd.
Gamma Metrics
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Innovative Technologies Inc.
Inova Microelectronics, Inc.
Integrated Communication Systems Inc.
Integrated Power Corporation
Mecanica Pasada, S.A.
Mex Control S.A. de C.V.
Micros Systems Inc.
Mictron, Inc.
Mirwec Film, Inc.
Mitsubishi Nuclear Fuel Co., Ltd.
Powerex, Inc.
Project Funding Corporation
Serratosa & Castells, S.A.
Siam Toracato de Tella, Ltd.
Silectra S.A. de C.V.
Speech Plus
Texas PFC, Inc.
Theta J Corporation
Turbine Metal Technologies, Inc.
Tyree Industries Limited
Westralian Transformers Pty. Limited
United Western Technologies Corp.
Vektron S.A.
W. S. Industries (India) Ltd.
Westinghouse Airship Industries, Inc.
Westinghouse de Argentina, S.A.
New Trends Corporation
Porta Pack Corporation
Country American Corporation
Horizon International Television, Inc.
Sutro Towers, Inc.
Metron, Inc.
Harbinger*EDI Services, Inc.
Industrias Electronica, S.A. (INDELEC)
Westinghouse Electro Metalurgicas C.A. (WEMCA)

Westinghouse do Brasil S.A. (WEBSA)
Electromar Industria Electrica Brasileira, S.A.
Westinghouse Electric Australia Holdings Ltd.
Email Westinghouse Private, Ltd.
Email Westinghouse Properties
Contadores Electricos, C.A. (CONTELCA)
Elektrik Techizati Imalti Tesisati, A.S.
Horiba Westinghouse, Ltd.
Hyosung Heavy Industries, Ltd.
Industria Electrica de Mexico, S.A.
Industria et Technologie de la Machine Intelligentie (ITMI)
ISCOSA Industries and Maintenance, Ltd.
Maihak A.G.
Reftrans, S.A.
Societe Generale de Travaux Electriques (SGTE)
ETIC BV Rotterdam
Westinghouse de Argentina, S.A.
Westinghouse Asia Controls Corporation (WEASIA)
Cemac Westinghouse Pty. Ltd.
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Westinghouse Plasma Systems International, N.V.
Westinghouse Saudi Arabia Ltd. (WSAL)
Westinghouse Motor Company
WEXICO Systems and Services, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Electric Power Board of Chattanooga ("EPB") has asked this Court to issue a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on July 14, 1989. Because the decision of the Sixth Circuit is correct and does not raise any questions that are worthy of review by this Court, respondents Monsanto Company, General Electric Company, McGraw-Edison Company, Central Moloney Inc, Wagner Electric Corporation, and Westinghouse Electric Corporation (collectively the "respondents") urge the Court to deny the Petition for a Writ of *Certiorari*.

STATEMENT OF THE CASE

This case concerns properly functioning electrical equipment, the overwhelming majority of which was purchased over ten years before the complaint was filed, and some of which was purchased as long as fifty years ago. Petitioner's claims were based on the mere presence in that equipment of polychlorinated biphenyls ("PCBs") and on the restrictions allegedly placed on the equipment by regulations issued by the Environmental Protection Agency ("EPA"). Because its claims were subject to dismissal under the pertinent Tennessee statutes of repose and limitations,[2] petitioner sought to circumvent these statutes by trying unsuccessfully to force the facts of the case into various legal theories which it argued would have saved its claims. First, petitioner alleged that the statutes were tolled by respondents' alleged fraudulent concealment of the alleged dangers of PCBs. When it appeared that this argument would be rejected because, as both the district court and the Sixth Circuit found, petitioner knew of the alleged hazards of PCBs "at the latest by 1980" (Pet. App. at 17a),[3] petitioner shifted its theory of the case to one based on property damage, alleging a cause of action based on the "weeping" or leaking of PCBs, which occurs during the normal operation of electrical equipment. Both the district court and the Sixth Circuit rejected these arguments and petitioner's claims were dismissed accordingly.

The dismissal of petitioner's claims by the district court and the Sixth Circuit's affirmance of that dismissal were based on

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2 The Tennessee Statute of Repose for products liability claims, T.C.A. § 29-28-102(6), bars all claims relating to products purchased over ten years before the filing of the complaint. Tennessee's statute of limitations for breach of warranty claims, T.C.A. § 47-2-725(2), is four years. Tennessee's statute of limitations for tort claims, T.C.A. § 28-3-105, is three years. All of petitioner's equipment was sold to it by August 1981, and most of it was sold to it by August 1975. Petitioner's complaint was filed on August 23, 1985.

3 References to the Sixth Circuit decision contained in the Petitioner's appendix are referred to herein as "Pet. App. at _____." References to the Petition are referred to herein as "Pet. at _____."

factual determinations concerning what petitioner knew about its injuries, and when petitioner knew it. Specifically, both the district court and the Sixth Circuit, relying on a massive and undisputed factual record,[4] held that petitioner's claims were time-barred under the applicable state statutes of limitations because the alleged dangers of PCBs, including the propensity of PCB equipment to leak, were actually known to petitioner and were a matter of public record for many years before it filed its complaint.[5] In reaching its decision, the Sixth Circuit concluded that there was no basis for applying the accrual date of a federal statute, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which EPB argued would have saved its claims, because the accrual date under SARA was identical to that of the state statute of limitations. (Pet. App. at 19a). This conclusion did not implicate or in any way involve any constitutional or other far-ranging provisions of law. Nor was it inconsistent with any decisions of other federal courts. Indeed, petitioner expressly acknowledges that the Sixth Circuit's decision is "the sole decision by a federal court of appeals on this point." (Pet. at 11; *see also* Pet. at 14, 15).

EPB nevertheless submitted a petition for *certiorari*, asserting that this Court should consider this case because the Sixth Circuit was supposedly "in error" (Pet. at 15) in deciding not to substitute the accrual date of the pertinent SARA provision, under which, according to EPB, its claims would have accrued later than under the Tennessee statute of limitations. (Pet. at 15). EPB's position is without merit.

First, this Court does not sit as a "court of error" and should not be reviewing a case simply because the petitioner believes it was wrongly decided. This is especially so where, as the petitioner admits, the decision below is "the sole appellate interpre-

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4 The record in this case included 360 filings and was approximately 5,000 pages long.

5 The district court held that petitioner's claims were barred by the Tennessee Statute of Repose. The Sixth Circuit held that petitioner's claims were barred under Tennessee's tort and warranty statutes of limitations and, therefore, did not need to address whether the claims were also barred by the Tennessee Statute of Repose.

tation" of the provision that purportedly was wrongly construed. (Pet. at 15). *Second*, the issue raised by EPB was *not* wrongly decided and is merely a red herring. The legislative history of SARA clearly reflects that the SARA provision at issue, 42 U.S.C. § 9658(b)(4), was intended to superimpose a discovery-based accrual date on those few states which do not already have one, and by its terms, the section may be invoked only if its accrual date is later than the accrual date under the state statute of limitations. *See infra* point IB. As the Sixth Circuit recognized, however, the Tennessee tort statute of limitations applicable to petitioner's claims is subject to a discovery rule identical to that of § 9658, and its application yields the same result as would application of § 9658. Thus, under either statute, EPB's claims would be barred because it knew or should have known of its alleged injuries many years before it filed its claims.

Indeed, the actual source of EPB's disagreement with the decision is not the Sixth Circuit's construction of the federal statute but the factual determinations which underlay the Sixth Circuit's application of the Tennessee statute of limitations, *i.e.*, determinations regarding the dates and nature of EPB's injuries, and its knowledge of such injuries. Such fact-based determinations do not represent important questions of law which this Court should consider.

Statement of Facts

The equipment at issue in this case consists of thousands of transformers which allegedly contained PCBs. The undisputed record reflects that all of this equipment was purchased more than four years before the commencement of this litigation and that the vast majority was purchased well over ten years before the filing of the action.[6] The record also reflects that, as a result of Congressional hearings, government reports and EPA

6 *See* R. 306: Def. Mem. in Support of Joint Motion to Enforce, Exh. 2. *See also*, R. 120: EPB Response No. 1 to GE Requests for Admission at 1-2; R. 83: EPB Supp. Answers to GE Interrogatories; R. 78: EPB Supp. Answers to McGraw-Edison Interrogatories; R. 81: EPB Supp. Answers to Wagner Electric Interrogatories.

notices and regulations, the alleged dangers resulting from the presence of PCBs in such equipment have been a matter of public knowledge since the 1970's. (Pet. App. at 9a). Part of that public record included an EPA notice issued in March 1980, which was based on reports submitted by utility industry representatives that PCBs tend to "weep" or "sweat" from electrical equipment during their normal operation, and which specifically requested information on the incidence and hazards of such leaks. (Pet. App. at 9a). The "weeping" and "sweating" addressed in that notice and in those reports are precisely the type of "property damage" which petitioner alleged in this case.

Petitioner admitted before the courts below that it reviewed and monitored the public record and proceedings concerning PCBs on a regular basis and has been aware since at least 1976 that PCBs may be hazardous.[7] Petitioner also admitted to the court below that PCB transformers leak "during normal operation" and that they knew this fact years ago.[8]

The District Court's Rulings

In a series of decisions which addressed the public record on PCBs and the key statute of limitations issues raised by that record, the district court dismissed petitioner's claims as time-barred. In those decisions, the court rejected petitioner's arguments that the pertinent statutes of repose and limitations were tolled by respondents' alleged fraudulent concealment of the hazards of PCBs, concluding that petitioner had actual knowledge of the hazards of PCBs at least since 1976.[9]

In an effort to avoid the first of the court's rulings that its claims were time-barred, petitioner amended its complaint and shifted its theory of the case from one based on the alleged restrictions on its equipment set forth in the EPA regulations to

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7 *See* R. 298: Order, April 30, 1987 at 3; R. 260: Affidavit of Ronald N. Fugatt ("Fugatt Aff.") ¶¶ 6-10; R. 260: Affidavit of Harold DePriest ("DePriest Aff.") ¶ 3.

8 *See* R. 260: DePriest Aff. ¶ 10.

9 *See, e.g.*, R. 298: Order, April 30, 1987 at 3.

one based on "property damage". This new focus was based on the SARA amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which were enacted only weeks before petitioner shifted its theory of the case. SARA provides for the preemption of state statutes of limitations for property damage and personal injury claims arising from a "release into the environment" of a "hazardous substance". With respect to such claims, the statute provides for a discovery-based accrual date (the "federally required commencement date") which preempts state statutes of limitations in those circumstances when a claim accrues earlier under the state statutes of limitations than it does under the federally required commencement date. *See* 42 U.S.C. § 9658.

Petitioner moved to modify and reverse the district court's order based on these SARA amendments, alleging, for the first time, that in 1982 they had observed "property damage" caused by leaks from 106 PCB transformers onto the floors of vaults in which the equipment was contained.[10]

The district court rejected petitioner's property damage claims, stating that the alleged "leaks" were not "releases into the environment" within the meaning of CERCLA and noting that petitioner was "attempting to force the facts of [the] case into CERCLA reasoning . . . ."[11]

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10 R. 260: Fugatt Aff. ¶ 6. Petitioner's initial attempt to construct a property damage claim within SARA was premised upon the pouring of PCBs into the equipment at issue by the respondents at their own facilities. R. 250: Response of EPB to Sangamo' otion for Summary Judgment at 11; *see also* R. 216: Memorandum in Support of Motion of Plaintiffs to Modify Order on Statute of Repose Issues at 7; R. 220: Plaintiffs' Response to Defendants' Memorandum in Opposition to Motion of Plaintiffs to Modify Order at 5-6. The district court rejected these claims and petitioner subsequently abandoned them.

11 R. 274: Order, February 19, 1987 at 3; *see also* R. 298: Order, April 30, 1987 at 2.

The Sixth Circuit Decision

The Sixth Circuit affirmed the district court's decision, rejecting both petitioner's fraudulent concealment and CERCLA arguments. The Sixth Circuit held that "[petitioner] had *actual* knowledge of the hazards of PCBs as used in electrical equipment" more than three years before they filed this suit (Pet. App. at 14a) (emphasis in original) and stated that petitioner's arguments to the contrary were "specious". (Pet. App. at 15a). In addressing the evidence of petitioner's prior knowledge of the alleged hazards of PCBs, the court reiterated the extensive public record on the dangers of PCBs, and singled out, as part of that record, the EPA's March 1980 notice, which requested information from utilities about the incidence and hazards of electrical equipment leaks. (Pet. App. at 15a). After observing that petitioner monitored EPA regulations relating to PCBs, and therefore presumably was aware of this notice, the court stated that petitioner "had every reason to become wary of the use of PCBs in electrical equipment by March 1980 at the latest." (Pet. App. at 14a-15a).

The Sixth Circuit then stated that the application of CERCLA and, in particular, the "federally required commencement date", to petitioner's claims would not change the result in the case because the federal accrual date "is virtually identical to the notion of an accrual date under Tennessee law". (Pet. App. at 19a). The court noted that under both CERCLA and the Tennessee statutes of limitations, petitioner's claims accrued when it knew or should have known of its cause of action (*i.e.*, when petitioner knew or should have known of the alleged "leaks" or "releases into the environment"). (Pet. App. at 19a). Accordingly, presented with petitioner's own statements that PCB equipment leaks during normal operation, the public record concerning the propensity of PCB equipment to leak during normal operation and the undisputed evidence of petitioner's knowledge of this public record, the court ruled that petitioner's property damage claims would be time-barred under either CERCLA or the Tennessee statute of limitations, thereby rendering application of CERCLA unnecessary.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUES WARRANTING SUPREME COURT REVIEW

The EPB contends that the Sixth Circuit erred in its interpretation of 42 U.S.C. § 9658 and ignored certain facts which allegedly established that EPB's injuries occurred within the period of limitations. The petition should be denied because it meets none of the requirements governing review on *certiorari* set forth in Rule 17. It does not involve a conflict either among the circuits or with any state court. Indeed, EPB admits that the Sixth Circuit's decision "is the only decision of which we are aware" that even addresses the issue EPB attempts to raise in this petition. (Pet. at 14). Nor does the petition present an important question of federal law with a potentially broad effect.

In fact, the entire petition is nothing more than an extended argument as to why the Sixth Circuit's decision was supposedly wrong on the merits. That argument requires this Court to review the validity of certain factual determinations made by the courts below—clearly an inappropriate task for this Court to undertake. In this case, moreover, such factual review would violate the longstanding rule that "this Court . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). Thus, a grant of *certiorari* would not only be unwarranted, but improper.

In addition, petitioner's claim that the Sixth Circuit's construction of § 9658 was erroneous is simply incorrect.

First, the Sixth Circuit did not rule that EPB's property damage claims accrued before the date of its injuries, and EPB's arguments to the contrary turn on a mischaracterization of the Sixth Circuit's analysis of the factual record.

Second, the accrual date for EPB's claims under the Tennessee statute of limitations is identical to the "federally required commencement date", and, therefore, the outcome of the case would have been the same regardless of which accrual date had been applied.

Third, the courts which have considered the issue of what constitutes a "release into the environment from a facility" within the meaning of § 9658 have unanimously concluded that § 9658 has no application to the factual circumstances presented by this case for reasons not addressed by the Court of Appeals.

A. The Sixth Circuit Did Not Hold That EPB's Claims Accrued Before The Date Of Its Alleged Injuries

EPB's entire petition is premised on the contention that, in applying the Tennessee statute of limitations to bar its claims for alleged property damage, the Sixth Circuit held that EPB's claims accrued before the date of its alleged injuries (*i.e.*, before the alleged release of a hazardous substance). An examination of the Sixth Circuit's decision in light of the factual record, however, demonstrates clearly that this is not what the Sixth Circuit ruled.

The extensive and undisputed record before both the district court and the Sixth Circuit reflects, *inter alia*, that EPB monitored and reviewed the public record and proceedings concerning the alleged hazards of PCBs on a regular basis and was aware of such hazards, including the propensity of PCB equipment to leak, for many years prior to the filing of their complaint. The incidence and hazards of leaks from PCB equipment have been the subject of EPA notices and regulations since at least March 1980. (Pet. App. at 14a). Moreover, EPB has admitted in its own submissions that leaks from PCB equipment, including its own such equipment, much of which has been in use for over thirty years, occur "during normal operation"[12] and are, therefore, common occurrences.

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12 R. 260: DePriest Aff. ¶ 10.

As the Sixth Circuit recognized, tort claims under Tennessee law accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F. Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Thus, when presented with the above record, the Sixth Circuit concluded that all of petitioner's claims, including its claims for property damage, were time-barred under Tennessee's statute of limitations because it knew or should have known of the availability of such claims long ago.[13] The Sixth Circuit did not hold that a claim could accrue under the Tennessee statute of limitations *before* the date of the injuries (*i.e.*, before the release of the hazardous substance).[14] To the contrary, the Sixth Circuit's explicit references to the EPA's public notice to the utilities concerning leaks from PCB equipment (Pet. App. at 9a) reflect that its decision was based on the reasoned conclusion that the types of leaks in question occurred years before the filing of the complaint and should have been known to EPB at least as early as March 1980.

Moreover, the Sixth Circuit's conclusions as to when EPB's claims accrued are heavily fact-based determinations which were rooted in a careful analysis of the record. Such determinations include findings concerning the dates of EPB's alleged injuries and its knowledge of those alleged injuries. Clearly, such findings should not be the subject of this Court's review.

That EPB's current quarrel is not with the Sixth Circuit's legal conclusions but with its factual determinations is further

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13 The court's conclusion was consistent not only with the case law of Tennessee but also with numerous jurisdictions which subscribe to the same concept of accrual as does Tennessee. In those jurisdictions, a plaintiff with the means of knowing the extent or cause of his injuries has a duty to inquire about such injuries, and breach of that duty results in the running of the statute of limitations. *See, e.g., Herrera-Diaz* v. *United States Dept. of Navy*, 845 F.2d 1534, 1537 (9th Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 306 (1988); *Huff* v. *Fibreboard Corp.*, 836 F.2d 473, 479 (10th Cir. 1987).

14 As the Sixth Circuit recognized, under Tennessee law a tort claim *cannot* accrue until the injury occurs. *See, e.g., Potts* v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988).

evidenced by its suggestion that its property damage claims based on alleged leaks "arose" within three years of the date of the complaint. (*See* Pet. at 10-11; *see also* Pet. at 9, 15). This position was not originally argued before the Sixth Circuit and was submitted to that court for the first time only in EPB's petition for rehearing. EPB's prior assertions in affidavits and briefs concerning the alleged leaks merely stated that upon inspection of certain PCB transformers in 1982, some of those transformers were "found to have leaks."[15] EPB never asserted in those papers that the leaks did not *occur* until after November 1982 and thus that no claim could have arisen until after that date.

B. The Commencement Date Under State Law Is Identical To The "Federally Required Commencement Date"

EPB contends that the Sixth Circuit should have applied the "federally required commencement date" contained in § 9658 to its claims for property damage, rather than the accrual date of the Tennessee statute of limitations. That contention, however, presumes that there is a distinction between the accrual date under the Tennessee statute of limitations and the federally required commencement date. (Pet. at 13-14). In fact, such a distinction does not exist, and there is no basis for the distinction in either Tennessee law, the language of the Sixth Circuit's decision, or the legislative history of § 9658.

Under Tennessee law, statutes of limitations for all tort claims, including claims for property damage, are subject to a judicially created "discovery rule". *McCroskey* v. *Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). As noted above, under this rule, such claims accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F.

15 R. 260: Fugatt Aff. ¶ 6; *see also* R. 259: Plaintiffs' Response to Westinghouse Electric Corporation's Motion for Summary Judgment at 5-7; R. 291: Affidavit of Ronald N. Fugatt ¶¶ 3-5; R. 293: Memorandum in Support of EPB's Motion to Modify March 20, 1987 Order at 2-6; and R. 322: Plaintiffs' Response to Defendants' Joint Motion to Enforce April 30, 1987 Order at 9.

Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Moreover, contrary to EPB's assertion, state law requires more than mere knowledge (or in this case, mere notice) of the injury before the statute begins to run. The would-be plaintiff must have knowledge of the existence of his cause of action against the tort-feasor, that is, knowledge of both the injury and its cause:

> [T]he discovery rule in Tennessee requires the discovery of the existence of a right of action, *i.e.*, facts which would support an action for tort against the tortfeasor—these facts include not only the existence of an injury, *but the tortious origin of the injury.*

Potts v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988) (emphasis supplied).

As the Sixth Circuit correctly concluded, the federally required commencement date reflects the identical concept of accrual. Thus, the language of § 9658 contains the critical "knows or reasonably should have known" language common to all discovery rules.[16] Indeed, the legislative history of § 9658 reflects that the very purpose of the provision was to establish the type of discovery statute of limitations for certain property damage claims which was already in place in Tennessee.[17] As demonstrated in a special report prepared for Congress by a group organized to study the ramifications of the then proposed § 9658, the intent of the statute was to superimpose a discovery

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16 Section 9658(b)(4)(A) states that the federally required commencement date "means the date the plaintiff *knew (or reasonably should have known)* that the . . . [property damages in question] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." (emphasis added).

17 *See* Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Waste—Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980* (P.L. 96-510), S. Rep. No. 97-12, 97th Cong., 2d Sess. ("Section 301(e) Report"), pt. 1 at 240. EPB recognized that § 9658 merely established "a discovery statute of limitations for toxic tort action brought in state court" in its brief before the Sixth Circuit. Plaintiffs' Appellate Brief at 37.

rule upon the "small number of states [which] still follow the so-called traditional rule that the cause of action accrues from the time of exposure" and "[a]nother small number of states [which] has not as yet clearly adopted either the traditional or discovery rule". Section 301(e) Report, pt. 1 at 240.

The Sixth Circuit was therefore correct in ruling that accrual of a property damage claim occurs at the same time under the Tennessee statute of limitations as it does under the federally required commencement date. Since there was no conflict between the federal and state rules, the federal provision is inapplicable by its own terms. Section 9658 states that the federally required commencement date for certain property damage claims shall be applied in lieu of the date specified by the state's statute of limitations only if the accrual date under the state's statute of limitations period is earlier than the federally required commencement date. § 9658(a)(1). In this case, the commencement dates under § 9658 and the Tennessee statute of limitations are the same, and the Sixth Circuit was required to apply the state statute of limitations.

C. The Courts Which Have Addressed The Issue Of What Constitutes A "Release Into The Environment From A Facility" Within The Meaning Of § 9658 Have Unanimously Concluded That § 9658 Does Not Apply To The Factual Circumstances Presented By This Case

The Sixth Circuit saw no need to address the separate question of whether the kind of leaks involved in this case constitutes property damage within the meaning of § 9658. However, if this Court were to conclude that the accrual date under § 9658 differs from that of the Tennessee statute of limitations, § 9658 still would not control the outcome of this case. All courts that have interpreted § 9658 in the context of the types of leaks alleged in this case have concluded that it has no application. The reasons articulated by these courts preclude application of § 9658 to the facts of this case.

First, § 9658 does not apply because a statutory prerequisite to the application of the statute, *i.e.*, a "release into the envi-

ronment from a facility", did not occur. *See* 42 U.S.C. § 9658(a)(1); 42 U.S.C. §§ 9601(8), (9), (22); R. 298: Order, April 30, 1987 at 2. As the district court found, the record does not support any claim that a hazardous substance, leaking from one facility (a transformer) into another (a vault housing the transformer), constituted a release "into the environment" as defined in the statute.[18] This is because the vaults into which the leaks occurred do not fit within any of the statutory categories defining "environment": navigable waters, surface water, groundwater, drinking water, land surface or subsurface strata, or ambient air. 42 U.S.C. § 9601(8). Other courts have reached the same conclusion.[19]

Second, § 9658 is inapplicable because this case could not give rise to an underlying CERCLA claim. Congress intended § 9658 to preempt state statutes of limitations only in "personal injury or property damage causes of action under state law in situations where there is an underlying CERCLA action providing for cleanup and remedial activities." *Knox* v. *AC&S, Inc.*, 690 F. Supp. 752, 757 (S.D. Ind. 1988). *See also Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp.

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18 R. 349: Order, January 26, 1988 at 2.

19 *See Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp. 1069, 1081 (E.D. Tenn. 1988) (Edgar, J.). In that case, the court concluded that "the leaking of a relatively small quantity of dielectric fluid" containing PCBs from a transformer into a vault is not "the type of release into the environment contemplated or intended by the CERCLA." *Id.*

Even more recently, the Seventh Circuit acknowledged that interpreting the term "environment" in such a way that a "release into the environment" occurs, for example, "the instant a container of asbestos is opened" would render the term meaningless. *Covalt* v. *Carey Canada Inc.*, 860 F.2d 1434, 1436 (7th Cir. 1988). Judge Easterbrook observed that:

> [s]uch a global treatment erases "released into the environment" as a limitation, however, by ensuring that it is always satisfied.
>
> . . .
>
> [I]t is hard to believe that "released into the environment" is an empty phrase.

860 F.2d at 1436-37.

at 1081. EPB has conceded that this case does not present an underlying CERCLA claim.[20]

Thus, § 9658 would not provide the rule of decision in this case in any event.

Conclusion

For the foregoing reasons the petition for a writ of *certiorari* should be denied.

Respectfully submitted this 22nd day of November, 1989.

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20 *See* R. 342: Pl. Reply to Def. Response at 4, 9.

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